Supreme Court, U.S.
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No. 95-1106

In The

Supreme Court of the United States

October Term, 1995

JOHN H. PARSA,

Petitioner,

vs.

JAMES C. WHITE, JR., individually and in his official capacity as Director of the Finance Department of the State of Alabama; and HALYCON V. BALLARD, in her official capacity as the Director of the Personnel Department of the State of Alabama,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS JAMES C. WHITE, JR. AND HALYCON V. BALLARD

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT THE DISTRICT COURT APPLIED THE PROPER LEGAL STANDARDS AND RENDERED THE CORRECT JUDGMENT?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Respondents represent that the parties to this brief are all named in the caption of this case. To the knowledge of the Respondents, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 8, 1995 (App. 1a to Petition) and the order denying rehearing and rehearing en banc was entered on October 11, 1995 (App. 27a to Petition). Unpublished decisions of the United States District Court for the M.D. of Alabama were entered on August 22, 1994 (App. 2a to Petition) and September 9, 1994 (App. 26a to Petition).

OBJECTION TO JURISDICTION

Respondents submit that this Court does not have jurisdiction to review the order in question by writ of certiorari because none of the possible questions presented by the Petitioner concern conflicting decisions of courts of appeal or state courts nor this Court. This objection is discussed further *infra*.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Lower Court

This action was initially filed in the United States District Court for the Middle District of Alabama by Plaintiff/Petitioner John H. Parsa ("Parsa") against James C. White, Sr., individually, and in his official capacity as the Director of the Finance Department of the State of Alabama ("White"), and Halycon V. Ballard, in her official capacity as Director of the Personnel Department of

the State of Alabama ("Ballard"). The claim against Ballard is asserted in her official capacity only in order to achieve any injunctive relief granted. Parsa's Complaint against White, as amended, sought redress under 42 U.S.C. § 1983, 42 U.S.C. § 1981, the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964, based on race, sex, age and national origin discrimination. Parsa's claims arose out of his failure to receive a promotion to the position of Director of the Data Systems Management Division ("DSMD"). Appellees generally agree with the Course of Proceedings and Disposition Statement set forth in Petitioner's Brief, with the following additions.

Since the Appeal was filed, Forest H. ("Fob") James was elected and sworn in as Governor of the State of Alabama, replacing Governor James Folsom. With the change in administration, Jimmy H. Baker was appointed Acting Director of the Finance Department of the State of Alabama, replacing White. As of this date, Phillip Williams has been appointed Finance Director. White remains as a defendant to those claims alleged against him in his individual capacity. For ease of reference, the claims alleged against the Finance Director in the official capacity and in the individual capacity shall continue to be referred to collectively as against White.

Since the primary focus of Parsa's Petition is on his alleged First Amendment claim, a more detailed explanation of the Course of Proceedings in this regard is appropriate. Parsa's original Complaint, as amended, made no reference to an abridgement of his First Amendment rights. (R 1-1). His first pleading in the case raising this issue was not filed until approximately eight months

later, on August 5, 1994, via a Motion for Leave to Add a Contention to the Pretrial Order. (R 2-41). This motion was filed approximately six weeks after the final pretrial conference and approximately two and one-half weeks before the scheduled start of the trial and after White's Motion for Summary Judgment had been briefed, argued and additional discovery allowed. More importantly, no amended complaint was filed by Parsa raising the First Amendment issues. White responded with a Motion to Strike (R 2-46) and no discovery was conducted on this issue. The district court recognized the untimeliness of the amendment but, nevertheless, felt the record was sufficiently developed to dispose of the claim in favor of the defendant. (R 1-47-23, f.n. 11).

B. Statement of the Facts

White adopts the Factual Background contained in the Court's Memorandum Opinion. (R 2-47-2-9).

White takes strong issue with a misstatement of fact in Parsa's Petition, however. Parsa contends that *if* White had recommended Parsa to Governor Folsom, Folsom would have approved Parsa's selection. (Petition p. 9). Folsom attested otherwise.

Although White did not recommend Parsa for the permanent directorship appointment, it is uncontradicted that had White made such a recommendation, Waldrep would have been contacted and the matter would have been discussed with the Governor. (R 2-44, in separate envelope, Waldrep Depo. pp. 36-44; Tanner Depo. p. 42). What would have happened next is clear. Waldrep would have recommended to the Governor that Parsa not be

appointed. (R 2-44, in separate envelope, Waldrep Depo. pp. 44-46). Furthermore, the Governor would have listened to such recommendation. "[I]f Charlie Waldrep advised against Mr. Parsa in this case, I would have followed the advice of Mr. Waldrep and not approved the recommendation of Mr. Parsa if, in fact, Mr. Parsa had ever been presented to me for approval." (R 2-44, in separate envelope, Answers of James E. Folsom to questions submitted at 2; Folsom Depo. p. 6).

REASONS FOR DENYING THE WRIT

A. Petitioner has not complied with Supreme Court Rule 10 by stating a compelling reason for granting the petition for a writ of certiorari.

The Petitioner has failed to state a compelling reason for granting the writ of certiorari in contravention of Supreme Court Rule 10. Petitioner has made no showing that the Eleventh Circuit's decision is in conflict with the decision of another United States Court of Appeals or is in conflict with relevant decisions of this Court.

Petitioner contends that the District Court erroneously relied on *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979). However, there is no showing that *Stegmaier* conflicts with any other circuit court holdings or holdings of this Court. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

All of Petitioner's arguments consist of allegations of erroneous factual findings or assertions that a properly stated rule of law was misapplied. Therefore, the petition should be dismissed.

B. The United States Court of Appeals for the Eleventh Circuit correctly concluded that the district court applied the proper legal standards and rendered the correct judgment.

(1) The Eleventh Circuit's decision is correct under its holdings and the holdings of this Court.

The district court's decision is supported by the *Pickering/Connick* or *Elrod/Branti* tests enunciated by this Court. (*Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980)). The district court addressed Parsa's first amendment claim in the light of political patronage cases where this Court has held that under certain circumstances the first amendment rights of policymaking or confidential public employees may be abridged. The district court recognized that the highly sensitive nature of the data of the Director of DSMD was undisputed and "explained by a plethora of witnesses in excruciating detail," and found substantial security concerns for state government by the then governor. (R 2-47-24,25). "There can be no dispute that the Director of DSMD occupies a political, policymaking position that is entrusted with maintaining the security of numerous confidential documents affecting every area of state government." (R 2-47-24).

It is undisputed that the directorship was a high ranking position within state government. Parsa's assertion in argument that the directorship was one of "mid-management" is incorrect. Furthermore, Parsa's attempt to minimize the importance of the DSMD Director with the allegation that it was three steps removed from the Governor's office and two steps removed from White is not conclusive of the issue. This charting ignores the undisputed job description, duties and statutory mandate of the position.

Not every important policymaking and security conscious position in the myriad of Alabama state government will have the immediate ear of the Governor. This does not mean that the citizens of the state of Alabama cannot require that the "effective performance of the public office involved" require loyalty to the governor, or at the very least, an absence of disloyalty. This case does not involve, as Parsa argues, every highly responsible second or third level position in the state of Alabama, but rather a particular highly specialized, technical and security conscious position for which state law uniquely requires the Governor's approval before a director may be appointed. *Ala. Code* § 41-4-222.

It is clear that the Directorship position involves policymaking duties, relationships with a variety of government and elected officials and has access to extensive confidential information that is used by other policymaking individuals. The applicant's trustworthiness and loyalty to an administration are legitimate concerns for the effective performance of the office. The lower court's decision survives the *Branti/Elrod* test.

There is also precedent in a case such as this for applying the *Pickering/Connick* test. *See McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994) (Court applied all three tests); *Taylor v. Bartow County, GA*, 860 F. Supp. 1526 (N.D.Ga. 1994) (Court steadfastly applied *Pickering/Connick* test). *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), cited with approval in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), also supports the proposition that the *Pickering/Connick* test is applicable in this situation, noting that the *Elrod/Branti* test is more properly applied in a raw political patronage discharge and is not suited to cases of "personal, political loyalty."

> We do not believe that test [Elrod/Branti] is suited to the "personal, political loyalty" situation; it is too narrow. While it may adequately protect the only conceivable governmental interest and insuring same-party affiliation of a public employee, it is not flexible or broad enough to protect governmental interest in avoiding a variety of employee "expressions" involving specific insubordination or dereliction of duty having a "political" tinge, or, conceivably, deliberately giving a "political" cloak.

Jones, 727 F.2d at 1335, n.6.

It is clear that a public employee's protection from adverse action based on the public employee's speech and association is not absolute. As stated by the court in *Pickering* and followed by the Eleventh Circuit in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the court must balance "the interest of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the

public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734. In making this determination, the Eleventh Circuit has adopted a three-pronged test.

> First the Court must determine whether the employee's speech can be fairly characterized as implicating a matter of "public concern." If so, the speech is constitutionally protected. Second, the plaintiff must show that the speech was a "substantial or motivating factor" in the employment decision. Third, when both these showings have been made, the Court will apply the balancing test set out in *Pickering* . . . to determine "whether the adverse employment decision was justified."

Maples v. Martin, 858 F.2d 1546, 1552 (11th Cir. 1988) (citations omitted).

As reviewed by the Eleventh Circuit in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994):

> The Supreme Court has identified a number of factors for courts to consider when performing the balance: (1) whether the employee's exercising rights "impairs discipline by superiors or harmony among co-workers"; (2) whether the employee's exercising rights "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary"; and (3) whether the employee's exercising rights "impedes the performance of the [employee's] duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899 (citations omitted).
>
> The principle underlying the focus on these factors seems to be that the employer's interest will

> weigh more heavily in the *Pickering* balance the more closely the challenged employment action serves the employer's interest in the efficient and effective functioning of the office.

McCabe, 12 F.3d at 1570.

Other factors to be examined include whether the position of Director included the:

> power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, responsiveness to partisan politics and political leaders, responsibilities that are not well defined or are of broad scope, input into hiring decisions, supervision of employees, development of office policies and practices, and communication with the public . . .

Stott v. Martin, 783 F. Supp. 970, 982-983 (E.D.N.C. 1992) (Citations omitted).

Factors weighing on the employer's side are situations where the employee enjoyed a confidential relationship, policymaking authority, or extensive public contact on the employer's behalf. *Bates v. Hunt*, 3 F.3d 374 (11th Cir. 1993); *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992). Certainly, access to confidential information is a legitimate government concern weighing heavily in an employment consideration. Courts also consider speech that severely impedes the employee's own effectiveness and the effectiveness of his office. *Morales v. Stierheim*, 848 F.2d 1145, 1151 (11th Cir. 1988) (concluded that employee's own statement tilted *Pickering* test in favor of governmental interest); *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988) (Applying *Pickering* test, court

upheld transfer of university professor who offered letter disrupting working relationships, producing atmosphere of tension and prohibiting efficient administration of department).

The Eleventh Circuit has found that the ability to keep confidences weighs heavily in favor of the employer.

> Where loyalty to an employer and the ability to keep confidences are essential to the proper performance of public functions, the public employer's interest will weigh heavily if the employee's exercise of the right would compromise loyalty and confidentiality, because restricting those rights may be necessary to preserve the employer's interest in effective office functioning. . . . For this reason, "[w]hen close working relationships are essential to fulfilling public responsibilities," the court has accorded "a wide degree of deference to the employer's judgment." *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692.

McCabe, 12 F.3d at 1570-71. *See also McDaniel v. Woodward*, 886 F.2d 311 (11th Cir. 1989) (Confidential secretary to state court judge); *Ray v. City of Leeds*, 837 F.2d 1542, 1544 (11th Cir. 1988); *Stegmaier v. Trammel*, 597 F.2d 1027, 1038-40 (5th Cir. 1979).

Parsa's loss in this matter is also a balance to be factored. This was a promotional decision. *Parsa was not terminated or demoted*. Parsa was not transferred to a less desirable position, except that he was returned to the previous assistant director position which he held prior to his provisional appointment. Parsa is still employed at the Department of Finance. He has not been caused to

lose his livelihood, pension, retirement or other state benefits which he may claim. Parsa is not tainted or stigmatized. The associational loss in question is also not great. This was not a family situation. This was not a political speech situation. This was an intimate association with a former governor. Clearly, Parsa's losses, if any, in this case do not outweigh the State's interest in conducting the business of the Department.

(2) There was no evidence that White's articulated legitimate non-discriminatory reasons were pretextual.

White's evidence of legitimate nondiscrimatory reasons is ample and is clearly set out in the lower court's opinion. Parsa's evidence of redressable discrimination is conspicuously absent and is limited to only a vague recollection to a post-selection comment regarding "social justice" as a basis for White's selection of another candidate for the promotion as opposed to a reason for the non-selection of Parsa. As the lower court found, this is not sufficient. Parsa clearly bears the burden of showing that these proffered reasons are mere pretext.

Parsa incorrectly characterizes White's actions in bypassing him as being based solely on Parsa's association with the former governor. In fact, White's testimony was that he did not reasonably believe that an appointment of Parsa to the position, even if recommended, *would have been approved by the Governor.* (R 2-43-1). It is undisputed in *Ala. Code* § 41-4-222 that the appointment of the director must be approved by the Governor. (Parsa Add. 6). It is certainly reasonable for White to believe that

Parsa, even if recommended, would not have been approved by the Governor, especially with an objection coming from Chief of Staff Waldrep. It is certainly reasonable for White to desire to avoid a hiring controversy within the new administration. The Court, while not bound by the legislature, can certainly read into *Ala. Code* § 41-4-222 the legislature's finding that the DSMD Director's position was sensitive enough to require the approval of the Governor when numerous other "mid-management" positions did not.

Parsa failed to show any direct or circumstantial evidence of any discriminatory statement or act by White. Without such evidence, Parsa's direct claims and his mixed motive claims were due to be summarily dismissed.

(3) White is entitled to the protection of the defense of qualified immunity.

It is undisputed that White, in selecting a candidate for the permanent directorship position out of ten names submitted to him by the State Personnel Board, was performing a discretionary function. As such, the burden is then on Parsa to show that White violated Parsa's "clearly established" federal rights and that every reasonable state officer faced with these circumstances would have known that his actions violated clearly established statutory or constitutional laws. *Ziegler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (per curiam).

The issue is a very fact specific one: Was it reasonable for White to rely on the certification of eligibles issued by the State Personnel Department, reflecting that the two

applicants to whom he offered the appointment were qualified to hold the position? Was it likewise reasonable for White to rely on the instructions of the Governor's transition team to remove Parsa from his sensitive provisional appointment because Parsa was perceived as a security risk to a smooth transition and the new administration? Was it likewise reasonable for White to conclude that the submission of Parsa to the Governor for permanent appointment would have been rejected or, at best, would have caused heated debate over the appointment wherein the recommendation of one of the other qualified candidates would not? Considering the fact specific nature of this particular job, it cannot be said that every reasonable official would have known that such actions were clearly illegal.

In holding that White was entitled to qualified immunity, the district court correctly concluded that "no reasonable factfinder could determine other than 'that a person in . . . [White's] position could reasonably believe' that he had no obligation to oppose Waldrep's adamant opposition to Parsa. *Bates v. Hunt*, 3 F.3d 374, 379 n.9 (11th Cir. 1993)." (R 2-47-20).

(4) Summary judgment was proper to Defendant Ballard.

The claim against Ballard was asserted in her official capacity only in order to achieve any injunctive relief granted. Because Ballard's liability is wholly derivative of White's, summary judgment was correct in her favor.

CONCLUSION

For the foregoing reasons, Respondents submit that the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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